IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID SENICK	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UNITED TRANSPORTATION UNION and	:	
CONSOLIDATED RAIL CORPORATION	:	**No. 01-1733**

MEMORANDUM ORDER

Plaintiff seeks review on procedural grounds of an arbitration decision at proceedings held pursuant to his collective bargaining agreement. Plaintiff also asserts claims against his former employer, Consolidated Rail Corporation ("Conrail"), and former union representative, United Transportation Union ("UTU"), for breach of the duty of fair representation. Presently before the court is defendant UTU's Motion to Dismiss plaintiff's complaint.[1]

[1] Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

The pertinent facts as alleged by plaintiff are as follow.

Plaintiff was an employee of Conrail from June 27, 1996 until May 7, 1997 when he was furloughed.[2] On May 27, 1997, plaintiff received a letter recalling him from furlough status in accordance Rule 51 of the collective bargaining agreement. On June 24, 1999 plaintiff notified Conrail that he was incarcerated in a Lehigh County work release program and "gave Conrail instructions in order that he could resume employment." By letter of June 30, 1997, plaintiff was notified that Conrail was terminating his employment because "being incarcerated [sic] in the Lehigh County Work release Program for DUI is not a valid reason for absence."

Plaintiff's collective bargaining representative UTU appealed his termination. Pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151, et seq., an arbitration hearing was held by a National Railroad Adjustment Board on December 9, 1998. Plaintiff alleges that before the arbitration he had discussions with union agents who told plaintiff there had been cases similar to his in which the Union had obtained favorable decisions. These agents told plaintiff that copies of those decisions would be obtained and presented to the Board, but this did not happen.

[2] Prior to his employment with Conrail, plaintiff was employed by the Philadelphia, Bethlehem and New England Railroad for twenty-three years and had established seniority.

This failure plaintiff asserts was arbitrary, in bad faith and in breach of UTU's duty of fair representation.

The Board ultimately denied plaintiff's claim on September 13, 1999.[3]

In Count I, plaintiff asserts a claim for breach of the duty of fair representation under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and the Railway Labor Act ("RLA"), 45 U.S.C. § 151, et seq.[4] In Count II, plaintiff seeks review of the arbitration award of the National Railroad Adjustment Board pursuant to 45 U.S.C. § 153(q) on the ground that the Board "failed to comply with the requirements of the Act in that the decision was not made by a majority of the Board members assigned to the claim."

The copy of the Board's decision sent to plaintiff had the signature of only two of the board's three members, including the one dissenter. Plaintiff characterizes as "suspicious" a subsequent copy of the decision presented by defendants which

---

[3] The Board's decision is attached as Exhibit A to plaintiff's complaint. See In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996) (appended documents on which plaintiff's claims are based properly considered with motion to dismiss). The Board found that Rule 51 of the collective bargaining agreement, providing for automatic seniority termination, was self-executing and the Board was not in a position to "dispense leniency."

[4] Plaintiff actually cites to the Fair Labor Relations Act, 28 U.S.C. § 185(a). He presumably meant to cite to 29 U.S.C. § 185(a), the Labor Management Relations Act.

bears the signatures of all three Board members. He thus seems to question the authenticity of the document and whether two Board members truly did join in the adverse decision.

Defendant UTU moves to dismiss plaintiff's complaint on three grounds. First, it contends that plaintiff did not properly serve the complaint and the court thus lacks personal jurisdiction over UTU. Second, UTU asserts that the court does not have jurisdiction to adjudicate the breach of duty of fair representation claim insofar as it is based on the LMRA. Finally, UTU asserts that it is not a proper party to the claim in Count II because it acted only as plaintiff's union representative in the arbitration proceeding.

Plaintiff concedes that his "claim for review of the arbitration award is directed only against Defendant Consolidated Rail Corporation" and Count II should have been so limited.

UTU contends that service was improper under Pa. R. Civ. P. 403 and 404(a).[5] Rule 404 provides for methods of service when process is to be served out of state. Rule 404(2) provides for process by mail "in the manner provided by Rule 403." Rule 403 provides in pertinent part:

[5] This case was originally commenced in the Northampton County Court of Common Pleas and then removed by defendants to this court.

> If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the Defendant or his authorized agent.

UTU avers that plaintiff sent the complaint by first class mail and did not obtain a receipt signed by defendant or its agent.

UTU's focus on service of the complaint is misplaced. The "original process" was the filing of a Praecipe for Writ of Summons. See Pa. R. Civ. P. 1007 (action may be commenced by filing of praecipe for writ of summons or complaint). UTU was served by certified mail with the praecipe and its agent executed the return receipt card attached to the praecipe which was thereafter received by plaintiff.

UTU's contention that the court lacks jurisdiction over a claim for breach of the duty of fair representation in violation of § 301 of the LMRA, 29 U.S.C. § 185, is well taken. UTU correctly notes that § 301 specifically excludes from coverage those subject to the Railway Labor Act ("RLA"). The RLA defines a "representative" as any labor union or organization designated by a carrier's employees to represent them. Plaintiff has alleged that UTU was the collective bargaining representative for the employees of Conrail which plaintiff recognizes is a

carrier.[6] See Masy v. New Jersey Transit Rail Operations, Inc., 790 F.2d 322, 325 (3d Cir.)(LMRA expressly excludes employees and employers governed by Railway Labor Act from its coverage), cert. denied, 479 U.S. 916 (1986).

ACCORDINGLY, this day of November, 2001, upon consideration of defendant United Transportation Union's Motion to Dismiss (Doc. #3) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to the claim in Count I against defendant United Transportation Union under the LMRA and as to the claim against defendant United Transportation Union in Count II.

BY THE COURT:

_____

JAY C. WALDMAN, J.

[6] In finding it had jurisdiction to hear the plaintiff's claim, the Board found that the parties herein are carrier and employee within the meaning of the Railway Labor Act.